Re Yau Kin Mun; ex p Public Finance Bhd

HIGH COURT (IPOH) — BANKRUPTCY NO 29–209 OF 1998
CLEMENT SKINNER J
5 MAY 2000

Bankruptcy *— Petition — Reinstatement of bankruptcy petition — — Failure of judgment creditor to attend hearing of petition — Creditor's petition dismissed — Whether creditor's petition could be reinstated — Bankruptcy Rules 1969 rr 120 & 276 — Rules of the High Court 1980 O 32 r 5(4)*

The appellant ('judgment creditor') caused to be issued against the respondent ('judgment debtor') a creditor's petition seeking to have him adjudicated a bankrupt. When the creditor's petition came up for hearing, neither the judgment creditor nor its counsel was present, but counsel for the judgment debtor was. In the result, the deputy registrar struck out the petition. The judgment creditor filed a summons in chambers applying to have the creditor's petition reinstated to the list. The deputy registrar dismissed the application for reinstatement. Hence, the appeal by the judgment creditor. The sole issue for determination was whether a creditor's petition, which had been dismissed for the reason that on the date fixed for its hearing, the petitioning creditor had neglected to appear, may be reinstated to the list.

Held, dismissing the appeal with costs:

(1) Rule 120 of the Bankruptcy Rules 1969 ('the Rules') expressly deals with the situation where a petitioning creditor neglects to attend on the date fixed for the hearing. Neglect will result in a dismissal of the petition, for two reasons. Firstly, when a petition is called on for hearing and neither the creditor nor his solicitor is present, the registrar hearing the matter will have no choice but to dismiss the petition for the simple reason that there is no one to prosecute the petition. Secondly, r 120 of the Rules itself contemplates if a creditor neglects to appear on his petition, it will result in the petition being dismissed (see p 190F–G).

(2) Rule 120 of the Rules having expressly provided a procedure whereby a petition that had been dismissed may come before the court again at the instance of the same creditor against the same debtor in respect of the same act of bankruptcy, the Bankruptcy Act 1967 and the Rules deliberately do not provide for a procedure to reinstate a dismissed petition to the list. Therefore, resort may not be had to r 276 of the Rules, so as to enable the provisions of O 32 r 5(4) of the Rules of High Court 1980 to reinstate the petition to the hearing list (see pp 190I–191B); *Re Yap Ying Long; ex p FCJ Sdn Bhd* [2000] 5 MLJ 145 not followed.

(3) In the event that the court is wrong in its view that r 276 of the Rules cannot be resorted to and that consequently the judgment creditor is not precluded from applying for a reinstatement of its dismissed petition, the court wishes to add that it would not have ordered a reinstatement of the creditor's petition for the reason that the court did not find the explanation given for the absence of the judgment creditor or solicitors on the date of hearing of the petition acceptable (see p 191E–F).

[**Bahasa Malaysia summary**

Perayu tersebut ('pemiutang penghakiman') menyebabkan satu petisyen pemiutang dikeluarkan terhadap responden ('penghutang penghakiman') untuk mengisytiharkannya muflis. Apabila petisyen pemiutang tersebut dikemukakan untuk perbicaraan, pemiutang penghakiman dan peguamnya kedua-duanya tidak hadir, tetapi peguam bagi penghutang penghakiman hadir. Kesannya, timbalan pendaftar membatalkan petisyen tersebut. Pemiutang penghakiman memfailkan satu saman dalam kamar memohon untuk menghidupkan semula petisyen pemiutang. Timbalan pendaftar menolak permohonan untuk menghidupkan semula petisyen tersebut. Oleh itu, pemiutang penghakiman tersebut membuat rayuan. Perkara tunggal untuk diputuskan adalah sama ada petisyen pemiutang yang telah ditolak kerana pada tarikh yang ditetapkan untuk perbicaraannya pemiutang yang membuat petisyen tersebut gagal hadir di mahkamah, boleh dihidupkan semula di dalam senarai.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Kaedah 120 Kaedah-kaedah Kebankrapan 1969 ('Kaedah-kaedah tersebut') secara nyata berurusan dengan situasi di mana seorang pemiutang penghakiman cuai tentang kehadirannya di mahkamah pada tarikh yang ditetapkan untuk perbicaraan. Kecuaian akan membawa akibat petisyen itu ditolak, bagi dua sebab. Pertama, apabila satu petisyen dipanggil untuk perbicaraan tetapi pemiutang dan peguamnya kedua-duanya tidak hadir, pendaftar yang membicarakan kes tersebut tidak ada pilihan melainkan menolak petisyen tersebut dengan alasan ringkas bahawa tidak ada orang untuk mendakwa petisyen tersebut. Kedua, k 120 Kaedah-kaedah tersebut juga mempertimbangkan keadaan jika seseorang pemiutang gagal hadir untuk petisyen beliau, kesannya adalah petisyen tersebut akan ditolak (lihat ms 190F–G).

(2) Kerana kaedah 120 Kaedah-kaedah tersebut secara nyata telah memperuntukkan satu prosedur di mana satu petisyen yang telah ditolak boleh dikemukakan di hadapan mahkamah sekali lagi atas tindakan pemiutang yang sama terhadap penghutang yang sama berkenaan tindakan kebankrapan yang sama, Akta Kebankrapan

1967 dan Kaedah-kaedah tersebut secara sengaja tidak memperuntukkan apa-apa prosedur untuk menghidupkan semula satu petisyen yang telah ditolak di dalam senarai. Oleh itu, rujukan tidak boleh diperolehi dari k 276 Kaedah-kaedah tersebut untuk membolehkan peruntukan A 32 k 5(4) Kaedah-kaedah Mahkamah Tinggi 1980 menghidupkan semula petisyen ke senarai perbicaraan (lihat ms 190I–191B); *Re Yap Ying Long; ex p FCJ Sdn Bhd* [2000] 5 MLJ 145 tidak diikut.

(3) Sekiranya mahkamah tersilap dalam tanggapannya bahawa k 276 Kaedah-kaedah tersebut tidak boleh dirujuk dan oleh itu, pemiutang penghakiman tidak dikecualikan dari memohon pengembalian semula petisyen yang ditolak tersebut, mahkamah ingin menambah bahawa ia tidak akan memberi perintah pengembalian terhadap petisyen pemiutang kerana mahkamah tidak mendapati bahawa penjelasan yang diberi untuk ketidakhadiran pemiutang penghakiman dan peguam beliau pada tarikh perbicaraan petisyen tersebut boleh diterima (lihat ms 191E–F).

Notes

For cases on petition generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1857–1923.

Cases referred to

Mariam Sasiman v BBMB Factoring Bhd [1999] 5 CLJ 294 (refd)
Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73 (refd)
Re Yap Ying Long; ex p FCJ Sdn Bhd [2000] 5 MLJ 145 (not folld)

Legislation referred to

Bankruptcy Act 1967
Bankruptcy Rules 1969 rr 114(2), 120, 276
Rules of the High Court 1980 O 32 r 5(4)

Leonard Yeoh Soon Beng (*Soo Thien Ming & Nashrah*) for the appellant.
Shidev Singh (*LH Singh* with him) (*LH Singh & Co*) for the respondent.

Clement Skinner JC: **.** The sole issue that arises for determination in this appeal is whether a creditor's petition, which had been dismissed for the reason that on the date fixed for its hearing, the petitioning creditor had neglected to appear, may be reinstated to the list.

The issue arose in this way. On 20 October 1998, the appellant ('the judgment creditor') caused to be issued against the respondent (the 'judgment debtor'), a creditor's petition seeking to have him adjudicated a bankrupt. The act of bankruptcy relied upon in the petition was the

judgment debtor's non-compliance with a bankruptcy notice served on him on 5 June 1998, requiring him to pay the amount of RM208,801.49 due on a judgment obtained against him on 28 April 1986.

The creditor's petition was fixed for hearing on 7 October 1999 before the deputy registrar. On that day, when the petition was called on, neither the judgment creditor nor its counsel were present, but counsel for the judgment debtor was. As a result, the deputy registrar struck out the petition.

On 11 October 1999, the judgment creditor filed a summons in chambers applying to have its creditor's petition reinstated to the list and for a date to be fixed for its moving. To support its application for reinstatement, the judgment creditor filed two affidavits to explain why it neglected to appear on its petition. The first affidavit was sworn by the solicitor having charge of the matter. He explained that his firm only managed to serve the creditor's petition on the judgment debtor on 4 October 1999. Rule 114(2) of the Bankruptcy Rules 1969 ('the Rules') requires that there be at least eight clear days between the service and hearing of a creditor's petition. Realizing that there would not be eight clear days between the date of service of the petition and the date fixed for its hearing, the solicitors for the judgment creditor requested a firm of solicitors in Ipoh to appear on their behalf on 7 October 1999 to obtain a new date for the hearing of the creditor's petition. The second affidavit was sworn by the solicitor from the Ipoh firm who was to appear for the above mentioned purpose. He explained that on 7 October 1999, he arrived late at the Ipoh High Court as he was engaged in another matter at the sessions court, Ipoh, which had taken longer than he had anticipated in dealing with. For that reason too, he did not arrange for anyone else to appear on his behalf or on behalf of the petitioning creditor's solicitors at the Ipoh High Court that day.

The judgment creditor's application for reinstatement was heard by the deputy registrar on 27 January 2000, when it was dismissed. In doing so, the learned deputy registrar felt bound by the decision in *Mariam Sasiman v BBMB Factoring Bhd* [1999] 5 CLJ 294. In that case, a creditor's petition was dismissed because on the date of hearing before the senior assistant registrar ('SAR'), the judgment creditor was absent. The judgment creditor subsequently applied for reinstatement of the petition and the application was allowed by the SAR. On appeal, Faiza Tamby Chik J held, inter alia, that the SAR had no discretion to allow a reinstatement of the creditor's petition as the Bankruptcy Act 1967 and the Rules did not contain provisions allowing for such a reinstatement. In the course of his decision, Faiza Tamby Chik J also considered the question whether there was a lacuna in the Rules so as to warrant the application of r 276 of the Rules so that the Rules of the High Court 1980 could be resorted to reinstate the dismissed petition. The learned judge found that there was no lacuna in the Rules because r 120 clearly dealt with the consequence of a petitioning creditor not attending the hearing of his petition. In such an event, on a literal interpretation of r 120, the petition must be dismissed and no subsequent petition by the same creditor against the same debtor in respect

of the same act of bankruptcy can be presented without the leave of the court.

I should point out that when the judgment creditor's application for reinstatement was heard by the learned deputy registrar, the decision of Abdul Aziz J in *Re Yap Ying Long; ex p FCJ Sdn Bhd* [2000] 5 MLJ 145 (to which I shall refer shortly), had not yet been reported.

In arguing this appeal, Mr Leonard Yeoh, counsel for the judgment creditor, referred to the provisions of r 120 of the Bankruptcy Rules which is in the following terms:

> If any creditor neglects to appear on his petition no subsequent petition against the same debtor or debtors or any of them either alone or jointly with any other person shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the Court.

It was counsel's submission that r 120 does not state that if a creditor neglects to appear on his petition, it will result in the petition being either dismissed or struck out. Instead, according to counsel, r 120 merely provides that a subsequent petition against the same debtor may not be presented by the same creditor in respect of the same act of bankruptcy without the leave of the court. counsel also submitted that r 120 does not address the question of whether a creditor, whose petition had been struck out or dismissed because the creditor had neglected to appear on the hearing of the petition, may apply to have it reinstated. In the circumstances, submitted counsel, there is a lacuna in the rules by reason whereof, r 276 of the Rules would come into operation so that O 32 r 5(4) Rules of the High Court 1980 ('RHC'), (which permits an application that had been made in chambers but which had been struck out in the absence of the party making it, to be reinstated to the list), may be resorted to, so that in the context of what has happened here, the creditor's petition may be restored to the hearing list.

In support of his submission, counsel for the judgment creditor relied on the recent decision of Abdul Aziz J in the case of *Re Yap Hing Long; ex p FCJ Sdn Bhd*, where the learned judge held that as r 120 was not designed to answer the question whether a creditor, whose petition had been struck out because of his absence can apply to have it reinstated instead of having to present a fresh petition with leave of the court, and, as the question was not answered elsewhere in the rules, the learned judge held that r 276 of the Rules could be relied upon to render applicable O 32 r 5(4) of the RHC to reinstate the petition to the list. Abdul Aziz J, also held that as r 120 did not state that presenting another petition was the only course open to such a creditor, it ought not to be inferred that it intended to say so, in coming to the decision in *Mariam bt Sasiman v BBMB Factoring Berhad* [1999] 2 AMR 1664.

Relying on the decision in *Re Yap Ying Long ex p FCJ Sdn Bhd* , counsel for the judgment creditor urged me to reinstate the petition to the list.

As a fall back position, counsel submitted that if leave of court was required to present a fresh petition pursuant to r 120, then the application

to reinstate was such an application and should be allowed. Counsel submitted that grave injustice would be occasioned to the judgment creditor if its petition was not reinstated, as any fresh petition it may file may face the objection that more than 12 years have elapsed between the date of judgment and the presentation of a new petition.

The efforts of the judgment creditor before the deputy registrar and, now before me, are directed at having its creditor's petition, which had been dismissed, come before the court again. However, for reasons of its own, the judgment creditor does not wish to avail itself to the avenue open to it under r 120 of the Rules, which allows a creditor, whose petition has been dismissed by reason of a creditor's neglect to attend the hearing of its petition, to present with leave of the court, a fresh creditor's petition against the same debtor relying on the same act of bankruptcy. Instead, the judgment creditor perceives it as a right to apply for a reinstatement of its dismissed petition a right not mentioned anywhere in the Act and neither a procedure provided for in the Rules, but which counsel for the judgment creditor hopes to achieve by arguing that as there is a lacuna in the Rules, r 276 of the Rules should be resorted to. That rule reads as follows:

> 276. Rules of High Court applicable in event of lacunae
> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply, mutatis mutandis.

The question is, is there an absence of rules regulating what happens when a creditor's petition is fixed for hearing and the consequences arising there from?

To me, there is no absence of such rules. Very specific rules are found in rr 114–127, regulating the hearing of a creditor's petition. Of particular relevance to the issue at hand is r 120, which expressly deals with the situation where a petitioning creditor neglects to attend the date fixed for the hearing. Neglect will result in a dismissal of the petition. I have no doubt that this will be the result if a creditor neglects to attend on the hearing of his petition. I say so for two reasons. First, when a petition is called on for hearing and neither the creditor nor his solicitor is present, the registrar hearing the matter will have no choice but to dismiss the petition for the simple reason that there is no one to prosecute the petition. Secondly, r 120 itself contemplates that if a creditor neglects to appear on his petition, it will result in the petition being dismissed. If that was not the case, there would be no need to provide a procedure to regulate the presentation of a subsequent petition by the same creditor against the same debtor based on the same act of bankruptcy. It should be noted that r 120 does not prohibit a creditor, whose petition has been dismissed for neglect to attend, from coming before the court again without having to obtain leave. Such a creditor may issue and serve a fresh bankruptcy notice in respect of the debt still owed, and when the new bankruptcy notice is not complied with, present a fresh creditor's petition.

In my judgment, r 120 having expressly provided a procedure whereby a petition that has been dismissed may come before the court again at the

instance of the same creditor against the same debtor in respect of the same act of bankruptcy, the Act and Rules deliberately do not provide for a procedure to reinstate a dismissed petition to the list.

For the reasons given above, I must reject the submission that resort may be had to r 276 of the Rules, so as to enable the provisions of O 32 r 5(4) of the RHC to apply here. For the same reasons, I respectfully decline to follow the decision in *Re Yap Ying Long; exp FCJ Sdn Bhd*.

Counsel for the judgment creditor also referred to the case of *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73, but I found that the case did not help. It is related to a lacuna in the RHC applicable to the hearing of an appeal from the decision of the registrar to a judge in chambers.

With regard to the submission by counsel for the judgment creditor that if leave pursuant to r 120 was required, the application now before the court is an application for such leave, I regret I cannot accept this submission. The notion that somehow, by counsel simply saying so, an application, which has so obviously been worded and drafted as an application to reinstate a dismissed petition, can suddenly transform itself into or double up as an application for leave to present a subsequent petition against the same debtor relying on the same act of bankruptcy, is somewhat misconceived. I accordingly refuse to consider it as such an application.

If I am wrong in my view that r 276 of the Rules cannot be resorted to and that consequently the judgment creditor is not precluded from applying for a re-instatement of its dismissed petition, I wish to say that I would not have ordered a reinstatement of the creditor's petition for the reason that I did not find the explanation given for the absence of the judgment creditor or its solicitors on the date of hearing of the petition acceptable.

Faced with a situation where he was required to be present at the sessions court and the High Court on the same day, the Ipoh solicitor decided he should be at the sessions court first. It was open to the Ipoh solicitor to give reasons for the decision he made but he has offered none. Apart from giving the number of the suit which he was attending to, the Ipoh solicitor made no attempt to explain what the matter in the session court involved, and when it was first fixed so as to show that there were reasonable grounds for his decision to attend the sessions court first and why it took longer than he had anticipated. The fact that the Ipoh solicitor felt that he could deal with his case at the sessions court before attending the High Court suggests that he had ascertained what position on the hearing list for the day the case at the session court occupied, and what position on the hearing list the creditor's petition occupied, thereby showing it was reasonable in the circumstances to make the decision he did. However, the Ipoh solicitor has not stated what steps he had taken in this regard. The Ipoh solicitor also did not say anything about whether he is the only solicitor in his firm so that he had no choice but to attend to both the matters himself on that day. In the absence of the information described

above, I find the explanation given by the Ipoh solicitor unacceptable. It does not, afford a reasonable explanation for the judgment creditor's or its solicitors neglect to appear on its petition, so that discretion may be exercised in its favour.

In the result, I dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Moy Saw Han